88-434

(2)

Supreme Court, U.S.
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CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD J. SINNOTT,
PETITIONER,

v.

CHARLES A. RADIN, STATE-BOSTON RETIREMENT BOARD, THOMAS W. GATELY, LOUISE DAY HICKS, NEWELL COOK, BRIAN LEAHY, HAROLD J. CARROLL AND KEVIN H. WHITE
RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court
No. S-4754

Richard J. Sinnott,
Plaintiff, Appellee,

v.

Boston Retirement Board & others
Defendants, Appellants

APPEAL FROM JUDGMENT OF CONTEMPT
OF THE SUPERIOR COURT AGAINST
CHARLES A. RADIN, NON-PARTY WITNESS

Before
Hennessey, C.J., Wilkins,
Abrams, Nolan, & Lynch, JJ.

E. Susan Garsh, (Jonathan M. Albano with her) for Charles A. Radin,
Regina L. Quinlan for plaintiff, Richard J. Sinnott,
Boisfeuillet Jones, Jr., Carol D. Melamed & Barbara P. Percival of the District of Columbia, for The Washington Post, amicus curiae, submitted a brief.
James C. Heigham, for Massachusetts

Newspaper Publishers Association, amicus curiae, submitted a brief.
Jane E. Kirtley & Susan E. Bray of the District of Columbia, & James E. O'Connell, Jr., for Reporters Committee for Freedom of the Press, amicus curiae, submitted a brief.

June 13, 1988

LYNCH, J. This is an appeal from a judgment of civil contempt entered in the Superior Court, pursuant to an order of a single justice of the Appeals Court,[1] against a deponent, Charles A. Radin, a newspaper reporter, for refusing to comply with an order that he answer questions aimed at discovering the identities of confidential sources. We

1 We do not review the underlying order of the single justice of the Appeals Court which was an interlocutory order granted within the discretion accorded in G. L. c. 231, § 118, par. 1 (1986 ed.).

transferred the case to this court on our own motion and now reverse.

On April 5, 1982, The Globe Newspaper Company published an article, authored by Radin, concerning, inter alia, the application by Richard J. Sinnott (Sinnott) , a recently fired chief of the licensing division of the city of Boston, for an accidental disability pension. The article appeared in the wake of a "Globe Spotlight" report detailing alleged abuses in the awarding of pensions by the Boston Retirement Board (board). According to the article, the contents of Sinnott's accident statement, made by him as part of his application to the board, were "shared with a Globe reporter by City Hall sources." As reported in the newspaper article, Sinnott attributed his

disability to the emotional impact of his attendance, in his capacity as "city censor," at two 1979 rock concerts and at a "frenzied" licensing hearing during which a participating attorney died.

Five weeks after the article appeared, Sinnott commenced this action against the board, its members, and other city officials. The complaint alleges invasion of privacy in violation of G. L. c. 214, §§ 1B and 3B (1986 ed.) (counts 1 and 2), and a count said to be based on the plaintiff's First Amendment rights and Ninth Amendment privacy rights, in violation of 42 U.S.C. § 1983 (1982) (count 3).

On August 29, 1985, Sinnott subpoenaed Radin to attend a deposition and produce various documents, including

any and all which would "identify the 'sources' referred to" in the article. Relying on (1) the First Amendment to the United States Constitution; (2) art. 16 of the Declaration of Rights of the Massachusetts Constitution; (3) Mass. R. Civ. P. 26 (c), 365 Mass. 772 (1974), and Mass. R. Civ. P. 45, as amended, 387 Mass. 1222 (1983); and (4) the common law, Radin moved to quash the subpoena. The motion was denied on July 16, 1986, without prejudice for its renewal during the course of Radin's deposition. On July 31, 1986, Radin refused to answer any questions which might lead to the identification of three confidential sources. Radin renewed his motion to quash or, in the alternative, for a protective order, and Sinnott filed a

motion to compel further testimony, pursuant to Mass. R. Civ. P. 37 (a), 365 Mass. 797 (1974).

On August 8, 1986, a judge in the Superior Court granted Radin's motions on the ground, inter alia, that there had been no showing that the information sought by Sinnott was not "equally available to the plaintiff were he willing to undertake the investigative effort made by Mr. Radin, "[2].

On December 5, 1986, the same Superior Court judge issued findings of fact and rulings of law on the above noted motions

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2 It can be deduced from the record that, of the fifteen individuals identified by the board in its answer to an interrogatory as having access to the plaintiff's pension application, four had not been deposed prior to the August 8, 1986, order.

and denied Sinnott's motion to compel discovery. Applying the principles and considerations enunciated in Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information, 395 Mass. 164 (1985), the judge weighed Sinnott's interest in obtaining the names of the individuals who allegedly wrongfully divulged to Radin the information contained in Sinnott's pension application against Radin's and the public's interest in protecting the confidential nature of his sources. This balancing was conducted as a necessary component of the analysis required under Mass. R. Civ. P. 26 (c) to "assess the competing interests of preventing 'annoyance, embarrassment, oppression, or

undue burden or expense,' . . . and considerations of an efficient and just resolution of the action." Wansong v. Wansong, 395 Mass. 154, 156 (1985). Concluding that "the public interest in protecting the free flow of information," Petition for Promulgation of Rules, supra at 172, as demonstrated by the reforms which were in part attributable to the investigative journalism conducted by The Globe Newspaper Company, outweighed the questionable necessity,[3] of the sources'

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[3] While the judge questioned whether Radin had standing to argue that Sinnott's complaint failed to state a claim upon which relief can be granted, he considered and rejected Sinnott's contentions that the precise identities of the sources went to the "heart of the claim." See Dow Jones & Co. v. Superior Court, 364 Mass. 317 (1973). Indeed, the judge reasoned,

names for Sinnot's case and noting the availability of alternative methods of discovery, the judge denied Sinnott's motion to compel discovery.

The motion judge thereafter denied a subsequent motion to vacate his two previous orders and to compel discovery on the grounds that Sinnot failed to

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> "[I]t is unclear in the instant case why plaintiff needs to know the precise identity of Radin's sources. Plaintiff alleges defendants violated his right to privacy by permitting the contents of his application to be released to Radin against Board policy. . . . There is no question that Radin is not a person authorized to have such access, nor is there any question that Radin did have access." Therefore, the inquiry as to the sources' identities was deemed "more of a 'needless disclosure of confidential relations' than a question that goes to the 'heart of plaintiff's case.'"

present substantial reasons warranting relief from judgment, pursuant to Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974), and that there continued to exist alternatives to compelled disclosure.

Sinnott sought relief from a single justice of the Appeals Court, pursuant to G. L. c. 231, § 118 (1986 ed.). The single justice granted the petition to vacate the previous orders of the Superior Court and remanded the case for entry of an order requiring Radin, inter alia, to disclose his sources. In so doing, the single justice independently applied the considerations set out by Petition for the Promulgation of Rules, supra at 171-173, and concluded that (1) "the public disclosure of the personal information here in issue is

subject to serious limitations and restrictions"; (2) "[i]n view of the nature of the plaintiff's cause of action and the allegations set out in his complaint . . . the plaintiff has shown a real need for the information"; (3) the plaintiff's "endeavors [to secure the information from alternative sources] cannot be characterized as minimal"; and (4) "it has not been shown that the 'asserted damage to the free flow of information is more than speculative or theoretical.'"

In sum, the single justice's own balancing of the asserted interests led her to conclude that she could not "discern any public interest to be served by protecting the 'free flow' of information to which the public has, at

best, limited and restricted access."

Pursuant to the single justice's ruling, on February 10, 1988, a Superior Court judge entered an order requiring Radin to disclose his sources. On February 18, 1988, after resuming Radin's deposition, Sinnott moved for an order holding Radin in civil contempt for failing to comply. Sinnott's motion was allowed and Radin was ordered incarcerated until he provides testimony concerning the sources for the article. That order has been stayed pending appeal.

It is apparent that the contrary rulings of the Superior Court judge who denied Sinnott's motions to compel and of the single justice of the Appeals Court are premised on divergent views of

the strength of Sinnott's underlying claims for invasion of privacy. We need not, nor on this record with the case in its current posture do we think it appropriate to, resolve the various open questions involved in determining whether Sinnott's complaint states a claim under G. L. c. 214, §§1B or 3B. The narrow question on review in this case is whether the Superior Court judge's denials of the motions to compel and the motion to vacate those orders constituted an abuse of the "broad measure of discretion" accorded him. Matter of Roche, 381 Mass. 624, 638 (1980), citing Matter of Pappas, 358 Mass. 604, 614 n.13 (1971). "An adjudication of civil contempt against a nonparty constitutes a final judgment appealable pursuant to

Mass. R. A. P. 1 (c), 365 Mass. 844 (1974)," and "[the] validity of an underlying discovery order, disobedience of which has led to an adjudication of contempt, may be challenged on appeal from the adjudication of contempt," Matter of Roche, supra at 625 n.1. In these circumstances, we review the rulings of the Superior Court judge denying the motion to compel and granting a protective order. Unless that ruling constituted an abuse of discretion, there is no basis for the judgment of contempt. See Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). We discern no such abuse of discretion and, therefore, reverse the adjudication of civil contempt.

It is well settled that, in supervising discovery, a presiding judge is "obliged to consider the effect that compelled discovery would have on 'the values protected by the First Amendment, [even] though [these values were] entitled to no constitutional privilege.'" Matter of Roche, supra at 636, quoting Herbert v. Lando, 441 U.S. 153, 180 (1979) (Powell, J., concurring). The "needless disclosure of confidential relationships," Matter of Roche, supra at 637, is, therefore, to be avoided. While "[a] judge ruling on discovery requests must also take into account considerations of efficiency and economy," id., the critical inquiry, once there is "some showing that the asserted damage to the free flow of information is

more than speculative or theoretical," Petition for the Promulgation of Rules, supra at 172, requires "a balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information." Id.

The Superior Court judge was warranted in balancing Sinnott's need for the information against possible damage to the free flow of information,[4]. Nor can it be concluded that the Superior Court judge's view of the appropriate balance in this case was unwarranted by the record or based on an unreasonable

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[4] At his deposition, Radin testified to having three confidential sources. He would not divulge whether they were among various individuals already deposed. Contrast Matter of Roche, supra at 635.

assessment of several areas of unsettled law. Although this court has not recognized the existence of any special status for the institutional press with regard to First Amendment or art. 16 interests, see Matter of Roche, supra at 631-632 n.9; Commonwealth v. Corsetti, 387 Mass. 1, 4 (1982), it was not improper for the judge to consider the investigative purpose of and public interest in Radin's use of confidential sources. Cf. Von Bulow v. Von Bulow, 811 F.2d 136, 142-143 (2d Cir.), cert. denied sub nom. Reynolds v. Von Bulow, 107 S. Ct. 1891 (1987), quoting Baker v. F & F Inv., supra at 782 (explaining that the public interest in nondisclosure rested upon the concern that "the deterrent effect such

disclosure is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed'"),[5]. His assessment of the relative weight of these public interests cannot be said, as a matter of law, to be incorrect, especially in light of the questionable viability of Sinnott's invasion of privacy claims and the lack of a clear demonstration of reasons for a need to

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5 We stress, however, that, as noted by the judge, it is the protection for "information gathering [which] must exist if the First Amendment is to serve adequately the central purpose of facilitating intelligent decisions by self-governing people," Matter of Roche, supra at 632, rather than the evidence that, in this case, reforms actually resulted from the "Globe Spotlight" series.

know the precise identity of Radin's sources. Further, he correctly considered the availability of alternative sources, and, although Sinnott's efforts to pursue other avenues were not minimal, neither can it be said that, on balance, the existence of other potential sources was insignificant.

In addition to making arguments in support of the balance reached independently by the single justice of the Appeals Court, Sinnott focuses his argument on the extensive discovery already undertaken. His central argument is that to be required to continue depositions would be "to continue a game of hare and hounds," especially where, as here, all individuals previously deposed have either denied disclosing to Radin

or have refused to answer on Fifth Amendment grounds. Relying on Matter of Roche, supra, he contends further that, at the very least, Radin should be required to disclose to the extent necessary to determine whether any of the defendants perjured themselves. As to the gamesmanship argument, we need say nothing more than has already been said regarding the discretion of the motion judge. With regard to the possible existence of perjury in this case, we do not view such a possibility as so likely or so central to the case as to constitute grounds for disturbing the ruling of the motion judge. We therefore reverse the judgment of contempt against Charles A. Radin and the February 10, 1988, order directing him to answer

deposition questions. The case is remanded for further proceedings consistent with this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 87-0673-CV

RICHARD J. SINNOTT

v.

STATE-BOSTON RETIREMENT BOARD & others.[1]

MEMORANDUM AND ORDER

Pursuant to G.L. c. 231, §118, the plaintiff seeks relief from an order of the Superior Court denying his motion to compel disclosure by Charles A. Radin (Radin) of the identity of his sources of certain information used in preparing an article published in the Boston Globe and

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[1] Thomas W. Gately, Louise Day Hicks, Newell Cook, Harold J. Carroll, Brian M. Leahy, and Kevin H. White, and Charles A. Radin.

concerning the plaintiff. After hearing argument, I conclude that the plaintiff is entitled to relief on his petition for the following reasons.

I. THE PLAINTIFF'S CAUSE OF ACTION.

The plaintiff's action is brought under G.L. c. 214, §1B, and alleges, basically, that the defendants, directly or indirectly, violated his right of privacy by allowing or failing to prevent disclosure and dissemination of his application for a disability pension. The defendants are the State-Boston Retirement Board (board), the board's individual members and executive officer, the City of Boston's corporation counsel, and the Mayor, all as of May 14, 1982. Radin is not a defendant but he has been named as a respondent on the plaintiff's

petition under G.L. c. 231, §118.

General Laws, C. 214, §1B, inserted by St. 1973, c. 941, provides in pertinent part that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." As stated in Bratt v. International Business Machines Corp., 392 Mass. 508, 518 (1984): "This court has interpreted §1B to proscribe the required disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate, countervailing interest. See, e.g., Court v. Bristol-Meyers Co., 385 Mass. 300, 307-308 (1982)." See also Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71, 77 (1979) ("The notion of right of privacy is founded on the idea

that individuals may hold close certain manuscripts, private letters, family photographs, or private conduct which is no business of the public and the publicizing of which is, therefore, offensive").

II. THE NATURE OF THE DISCLOSED INFORMATION.

On April 5, 1982, an article by Radin appeared in the Boston Glove in which it was disclosed that the plaintiff had applied to the board for a disability pension. The cause and the nature of the disability as given by the plaintiff in his written application to the board were quoted from the application itself. The disclosed information carried the following attribution: "according to sources." The article also revealed that when the plaintiff was asked to comment

upon his application and its contents, he declined to do so, adding that he "thought all of this was supposed to be confidential."

As I read Globe Newspaper co. v. Boston Retirement Board, 388 Mass. 427 (1983), the information reported by Radin was "absolutely exempt from mandatory disclosure." Id. at 438. See G.L. c. 4, §7 twenty-sixth (c), as amended by St. 1977, c. 691, §1, and G.L. c. 66, §10. Although the disclosure of the information subject to an exemption to G.L. c. 66, §10, cannot be compelled, that restriction does not apply to a "voluntary and nondiscriminatory disclosure" of the information, "subject to the rights and privileges of persons named therein." Town Crier, Inc. v.

Chief of Police of Weston, 361 Mass. 682, 691-692 (1972). See also Dunn v. Board of Assessors of Sterling, 361 Mass. 692, 685-696 n.6 (1972). In short, Radin could not have compelled the board to provide him with the information he reporter in his article.

Further, I need not consider whether the board could have furnished the information voluntarily to Radin upon appropriate request. Cf., e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 292-293 (1979); General Chem Corp. v. Department of Environmental Quality Engineering, 19 Mass. App. Ct. 287, 291-292 n.3 (1985), and cases therein collected. It appears from an offer of proof made by the plaintiff, well referenced to documentary evidence and depositions, that the board

had a promulgated policy against disclosure of disability pension applications and medical certificates on the basis that the information therein contained fell outside the scope of "public records." Only those persons involved in processing the applications had access to the information under the board's policy. Disclosure could be made only upon vote of the board members. This was not done, ad each of the defendants deny disclosing the information. Finally, the fact that disclosure was made by three unidentified sources to Radin (according to Radin) in no way vitiates the policy that the board chose to adopt and promulgate. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 63 (1976); Connolly v.

Bromery, 15 Mass. App. Ct. 661, 665 (1983). Cf., Chrysler Corp. v. Brown, 441 U.S. at 293 n.14, 5 U.S.C. §552a.

Additionally, I think it worthy of some note that the records here in question "are necessary to the work of the . . . Board[]," Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. at 440 n.21, as compared to reports which are "of some usefulness to the general public." Id. at 441 n.23. The information here disclosed far exceeds that deemed permissible in Globe Newspaper Co. v. Boston Retirement Board and falls squarely within that found to be exempt from mandatory disclosure. Id., at 438. In summary, as I read the relevant authorities, the public has an interest in and the right to know how its

municipal employees are administering the disability pension program and the expenditure of public funds. However, when specific entries on a particular, identified application are discriminatorily disclosed, revealing "intimate details of a highly personal nature," the employee's privacy interest outweighs the public interest served by disclosure of the personal information. Getman v. NLRB, 450 F. 2d 670, 675 (D.C. Cir. 1971). See Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. at 691-692; Dunn v. Board of Assessors of Sterling, 361 Mass. at 695-696 n.6; Glove Newspaper Co. v. Boston Retirement Board, 388 Mass. at 437. See also Columbia Packing Co. v. U.S. Dept. of Agriculture, 417 F. Supp. 651, 655 (D. Mass. 1976),

off'd., 563 F. 2d 495 (1st Cir. 1977). I conclude that public disclosure of the personal information here in issue is subject to serious limitations and restrictions.

III. REFUSAL TO REVEAL THE SOURCES.

All the controlling authority concerning a reporter's claim of right to refuse to divulge the sources of information given in confidence have been collected and discussed recently in Petition for the Promulgation of Rules, 395 Mass. 164 (1985), and need not be elaborated upon herein. Rather, I apply those considerations set out at pages 171-173 to the present circumstances.

On August 8, 1986, December 5, 1986, and November 23, 1987, the Superior Court judge refused to compel Radin to disclose

the sources of his information for the reason, as stated in his third order, that the plaintiff "still has alternate route available other than compelling Radin to reveal his source." The plaintiff has described in detail in paragraphs seven through fourteen of his petition (with attached affidavits and other documentation) the steps he has taken to secure the information he seeks from sources other than Radin, when those steps were taken, and how they proved fruitless. These endeavors cannot be characterized as minimal nor, presumably, as inexpensive considering the number of depositions conducted. As described by the plaintiff, all persons having access to the plaintiff's files have been deposed and have denied disclosure of the

information to Radin. Notwithstanding these endeavors, the plaintiff has been given no hint, clue, or suggestion as to what more he can and should do. Although the denials of his motions to compel have been accompanied by this stated ground, I do not think that in the circumstances here presented, that stated basis for the orders of denial any longer constitutes an "explanation" as contemplated in Petition for the Promulgation of Rules, 395 Mass. at 173.

In view of the nature of the plaintiff's cause of action and the allegations set out in his complaint,[2] I

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[2] The defendants' joint motion for summary judgment alleging, among other things, that the plaintiff has no right of privacy in his disability pension application, was denied on July 11, 1986.

further conclude that the plaintiff has shown a real need for the information and is not seeking Radin's sources for purposes of harassment. Id., at 171-172. Critical to my decision is my further conclusion that it has not been shown that the "asserted damage to the free flow of information is more than speculative or theoretical." Ibid., at 172, citing Matter of Roche, 381 Mass. 624, 635 (1980). The Legislature has determined that the information here revealed should not flow freely but should be restricted by an "individual's interest in personal privacy." Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. at 437. I cannot, therefore, discern any public interest to be served by protecting the "free flow" of

information to which the public has, at best, limited and restricted access. See Petition for the Promulgation of Rules, 395 Mass. at 172-173.

IV. SUMMARY

The plaintiff-petitioner is entitled to relief from the order of the Superior Court judge erroneously denying his third motion to compel Radin to respond to certain questions concerning the sources of his information relating to the plaintiff's disability pension application. I am not unmindful of the possible consequences of my order. However, I think it inappropriate at this time to stay my order or entertain any requests to report my decision or grant leave to appeal. The reasons for this are that Radin is not a party to the

action and the consequences of my order are, at this stage, simply possibilities. Any appeal at this time, therefore, would be premature and any relief that might be sought is better left to a later stage (if such there be) of the proceedings.

Accordingly, the order of the Suffolk Superior Court entered in case no. 54952 on that court's docket on November 23, 1987, denying the plaintiff's motion to vacate prior orders and to compel discovery from deponent Charles A. Radin, is reversed. The matter is remanded to that court for the entry of a new order requiring that the deponent Charles A. Radin answer those twenty-eight questions set out in Exhibit 1 to the plaintiff's motion of September 29, 1987.

All until further order of the court or a single justice thereof.

By the Court (Perretta, J.)

Assistant Clerk

Entered: January 27, 1988

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO. 54952

* * * * * * * * * * * * * * * * * *

RICHARD J. SINNOTT,
Plaintiff

v.

STATE-BOSTON RETIREMENT BOARD, ET AL.,
Defendants

* * * * * * * * * * * * * * * * * *

ORDER

Pursuant to the Order of the Single Justice of the Appeals Court (Perretta, J.) dated January 27, 1988, and Docket No. AC-87-0673-CV, the Deponent, Charles A. Radin is hereby ordered to answer those questions numbered 1-28 as set out in Exhibit 1 to the plaintiff's Motion

dated September 29, 1987 and entitled Plaintiff's Motion to Vacate Orders Dated August 8, 1986 and December 5, 1986 and to Compel the Deponent Charles A. Radin to Answer Certain Questions. (A copy of the questions is annexed hereto).

The said Charles A. Radin is further ordered to appear at the office of the plaintiff's attorney, Regina L. Quinlan, 6 Beacon Street, Suite 300, Boston, MA 02108 at 2:00 p.m. on February 18, 1988 to provide answers to those questions in accordance with this Order.

_____

By the Court:

Date: February 11, 1988

EXHIBIT 1

QUESTIONS PROPOSED TO BE ANSWERED
UNDER OATH BY THE DEPONENT,
CHARLES A. RADIN

The plaintiff, Richard J. Sinnott, proposes that the deponent Charles A. Radin be compelled to answer the following questions under oath:

1. Did THOMAS W. GATELY provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

2. Did LOUISE DAY HICKS provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

3. Did BRIAN M. LEAHY provide you with

any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

4. Did NEWELL COOK provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

5. Did HAROLD CARROLL provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982 in addition to the any information attributed to him in the article dated April 5, 1982?

6. Did KEVIN H. WHITE provide you with any information concerning the

pension application of Richard J. Sinnott prior to April 5, 1982?

7. Did GEORGE K. REGAN, JR. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

8. Did SUSAN MORGAN provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

9. Did THEODORE V. ANZALONE provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

10. Did JOANNE PREVOST ANZALONE provide

you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

11. Did MELISSA JAD provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

12. Did JERRY COLELLA provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

13. Did JAMES MC DAVITT provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

14. Did GEORGE MC MASTERS provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

15. Did JOHN CULLEN provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

16. Did FRANCES MC MANUS provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

17. Did DENNIS MORGAN provide you with any information concerning the pension application of Richard J.

Sinnott prior to April 5, 1982?

18. Did KATHERINE KANE provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

19. Did THOMAS FRANCIS, JR. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

20. Did RONALD C. BRINN provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

21. Did JOAN SCHLOSS, ESQ. provide you with any information concerning the

pension application of Richard J. Sinnott prior to April 5, 1982?

22. Did KELAM S. DEDERIAN, ESQ. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

23. Did GERALD J. MC TERNAN, ESQ. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

24. Did MICHO SPRING provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

25. Did BENJAMIN KILGORE provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

26. Did THOMAS ARCADIPANE provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

27. Did THOMAS A. HICKEY, III, ESQ. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

28. If your answers to all of the preceding question is "No.", please

identify by name the person or persons who provided you with information concerning the pension application of Richard J. Sinnott prior to April 5, 1982.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO. 54952

RICHARD J. SINNOTT,
Plaintiff

v.

STATE-BOSTON RETIREMENT
BOARD, ET AL.,
Defendants

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM DEPONENT, CHARLES A. RADIN

FACTS

Before the Court is a motion by plaintiff Richard J. Sinnott to compel deponent Charles A. Radin to produce documents and to respond to questions concerning confidential sources, and a motion by Radin to quash or, in the alternative, for a protective order.

The underlying suit -- to which

Radin is not a party -- is against the State-Boston Retirement Board, the Board's individual members, the Board's executive officer, the City of Boston's corporation counsel, and the City of Boston's mayor, all of whom were in office as of May 14, 1982.

The subject matter of the underlying suit concerns an article written by Radin and published in The Boston Globe, concerning Sinnott's application for disability pension filed with defendant State-Boston Retirement Board. Plaintiff's claim is based on the allegedly wrongful release of this information to Radin.

Radin claims his three sources of information are confidential and that he need not divulge their names to

plaintiff. Plaintiff, on the other hand, seeks an order to compel Radin to divulge the names, claiming that they are essential to proving his claim.

On July 16, 1986, Radin's motion to quash was denied "without prejudice to seek protective relief if appropriate when the deposition is in progress." On July 30, 1986, plaintiff began to depose Radin, and Radin refused to answer questions which "would identify, or would tend to identify, the confidential source(s) used . . . in preparing the Article. . . ."

Plaintiff and Radin, for the purposes of these motions, have stipulated to certain facts. The stipulations are hereto attached.

Radin's arguments are essentially:

(1) plaintiff's complaint fails to state a claim upon which relief can be granted; (2) the interests in preserving Radin's pledge of confidentiality to his sources outweigh plaintiff's interest in discovery; and (3) plaintiff has failed to exhaust alternative means of obtaining the identity of the sources. See Memorandum of Charles A. Radin In Support of His Renewal Motion to Quash or, In The Alternative, For A Protective Order.

DISCUSSION

Of Radin's three arguments, only the second is worthy of much discussion. As a non-party, Radin probably has no standing to raise plaintiff's failure to state a claim. More importantly, defendants have raised the issue in a motion for summary judgment which was

denied.

Radin's third argument -- that plaintiff has not exhausted all alternative remedies -- is but one factor to consider in balancing Radin's right to protect his confidential sources against plaintiff's right to obtain the names of those sources. See In Re Roche, 448 U.S. 1312, 1315-1316 (1980).

The real question for discussion, then, is to "assess the competing interests of preventing 'annoyance, embarrassment, oppression, or undue burden or expense,' . . . and considerations of an efficient and just resolution of the action." Wansong v. Wansong, 395 Mass. 154, 156 (1985).

The United States Supreme Court has declined to grant newsmen a testimonial

privilege under the First Amendment not enjoyed by other citizens. Branzburg v. Hayes, 408 U.S. 633, 690 (1972).

The Supreme Judicial Court of Massachusetts has also declined to establish a common law reporter's privilege. Petition for the Promulgation of Rules, 395 Mass. 164, 165 (1985).

Neither the U.S. Supreme Court nor the Supreme Judicial Court, however, has left the press without any rights to protect sources. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Bransburg v. Hayes, supra at 681. "Some protection for such information gathering must exist if the First Amendment is to serve adequately its central purpose of facilitating

intelligent decisions by self-governing people." In the Matter of Roche, 381 Mass. 624, 632 (1980).

The Supreme Judicial Court in its Petition opinion, discussed a number of factors to be weighed in "balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information." 395 Mass. at 172. "[T]he availability of alternative remedies to compelled disclosure should be considered." Id. at 171. The trial judge should weigh the impact of compelled disclosure on values underlying the First Amendment and art. 16 of the Massachusetts Declaration of Rights, and to "prevent 'harassing' or the 'needless disclosure of confidential

relationships.'" Id. at 171-172.

In striking this balance, the Supreme Judicial Court has cautioned "that those seeking to prevent disclosure . . . must make some showing that the asserted damage to the free flow of information is more than speculative or theoretical." Id. at 172.

Radin has presented plaintiff and the Court with a list of eleven possible sources whom plaintiff has not deposed, plus two who have been deposed and who pled the Fifth Amendment privilege against self-incrimination. See List of Possible Alternative Sources of the Information Which Plaintiff Seeks to Obtain from Charles A. Radin.

Plaintiff argues that Radin should, at a minimum, disclose whether those

already deposed include his sources, or whether those on Radin's suggested list include the sources, so plaintiff can avoid any exercise in futility.

By not providing such clues, Radin is clearly attempting to avoid one of the pitfalls in Roche. In Roche, a television reporter refused to reveal confidential sources, but testified in deposition that his sources were among a list of some sixty-five people who might be called as witnesses. The Court found that Roche had for all practical purposes identified the sources and was merely dictating when they would be revealed, because plaintiff could have deposed all sixty-five and then, if not satisfied, deposed Roche and asked which person or persons perjured themselves.

In the instant case, the list presented by Radin merely picks out names revealed through other depositions as some people who had access to the records. It is not an exhaustive list, but merely proves that plaintiff had routes available other than compelling Radin to reveal his sources.

Plaintiff relies on a number of libel actions in which the courts have found that the name of the maker of the libelous statement was at the "heart of the claim," and ordered the reporter in question to reveal the name of the confidential source. See Garland v. Torre, 259 F. 2d 545 (2nd Cir. 1958), cert. denied 358 U.S. 910; Dow Jones & Company v. Superior Court, 364 Mass. 317 (1973).

In deciding the Dow Jones case, the Supreme Judicial Court distinguished it from Baker v. F & F Inv., 470 F. 2d 778 (2nd Cir. 1972), because in Baker, in addition to state legislation protecting journalists to some extent, the reporter in Dow Jones was a party to the underlying suit and plaintiffs had convinced the Court that the source names were essential to their action. 364 Mass. at 321.

Unlike the libel case, where the name of the person who made the libelous statement was essential, it is unclear in the instant case why plaintiff needs to know the precise identity of Radin's sources. Plaintiff alleges defendants violated his right to privacy by permitting the contents of his

application to be released to Radin against Board policy. Plaintiff's Memorandum in Opposition to Motion to Quash of Charles A. Radin at 22. There is no question that Radin is not a person authorized to have such access, nor is there any question that Radin indeed did have access.

If the inquiry is more than an exercise of curiosity on plaintiff's part, it seems more of a "needless disclosure of confidential relations" than a question that goes to the "heart of plaintiff's case."

CONCLUSION

The Supreme Judicial Court has noted "that the method of case-by-case adjudication involves a balancing between the public interest in every person's

evidence and the public interest in protecting the free flow of information." Petition for the Promulgation of Rules, 395 Mass. 164, 172 (1985).

The gains to the public achieved through the free flow of information are documented by Radin in Affidavit of Thomas R. Lussier, as it relates to the instant case. Lussier served as Deputy Commissioner of the Division of Public Employee Retirement Administration from January, 1983, to October, 1984. Lussier recites in his affidavit numerous reforms that resulted from the series of articles in The Boston Globe, of which the article about Sinnott was one part. The implication is clear that if Radin were compelled to testify and thus revealed his sources, such sources would cease to

exist in the future and such reforms would not take place.

When parties to the Watergate suit attempted to depose a number of reporters concerning their confidential sources, the D.C. District Court refused to compel the testimony. That court stated that the importance of the events "transcends anything yet encountered in the annals of American judicial history. Moreover, movants are not parties to the actions, but have merely been called to testify and produce documents at deposition. The parties on whose behalf the subpoenas were issued have not demonstrated that the testimony and material sought go to the 'heart of [their] claim,' as was found to be true in the case of Garland v. Torre (footnote omitted)." Democratic

National Committee v. McCord, 356 F. Supp. 1394, 1397 (D.D.C. 1973).

The reforms discussed above, together with the questionable necessity of the source names for plaintiff's case and the availability of alternate methods to discover those names, favor Radin's motion to quash or for a protective order over plaintiff's motion to compel disclosure.

ORDER

It is hereby ORDERED that plaintiff's motion to compel discovery from deponent Charles A. Radin is DENIED.

Thomas R. Morse, Jr.
Chief Justice of the
Superior Court

Dated: December 5, 1986

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.
SUPERIOR COURT

CIVIL

ACTION

NO.

54952

RICHARD J. SINNOTT,
Plaintiff

v.

STATE-BOSTON RETIREMENT
BOARD, ET AL.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO VACATE ORDERS DATED AUGUST 8, 1986 AND DECEMBER 5, 1986 AND TO COMPEL DEPONENT CHARLES A. RADIN TO ANSWER CERTAIN QUESTIONS

This matter is before the Court on the plaintiff Richard Sinnott's motion to vacate two earlier orders and to compel deponent Charles A. Radin ("Radin"), a newspaper reporter for the Boston Globe, to respond to questions concerning

confidential sources. Radin opposes the plaintiff's motion, and renews his motion to quash or, in the alternative for a protective order.

Plaintiff's suit against the defendants, State-Boston Retirement Board, et al., to which Radin is not a party, is based on G.L. c. 214, § 1B. That statute provides that "a person shall have a right against unreasonable, substantial or serious interference with his privacy." G.L. c. 214, §1B. Plaintiff alleges that the defendants violated his right of privacy under G.L. c. 214, §1B by permitting the contents of his pension application to be disseminated and released to the press. Radin used three sources of information in preparing the article published by the

Boston Globe newspaper concerning the plaintiff's pension application.

Plaintiff seeks to compel Radin to reveal the identity of his confidential sources on the grounds that the information is essential to the case. Radin, on the other hand, argues he need not divulge their names because his three sources of information are confidential.

On two earlier occasions, this court denied the plaintiff's motion to compel Radin to reveal his sources. Pursuant to Mass. R. Civ. P. 60(b), the plaintiff now moves to vacate these two earlier orders and compel disclosure. A motion under Mass. R. Civ. P. 60(b) for relief from judgment is addressed to the judge's discretion. The Trustees of the Stigmatine Fathers, Inc. v. Secretary of

Administration and Finance, 369 Mass. 562, 565 (1976). However, the reasons argued for relief must be substantial enough to warrant relief under Rule 60. Here, the plaintiff has essentially reargued the motion that was denied on December 6, 1986.

This Court finds that the plaintiff has not presented any valid grounds on which to disturb the previous two rulings. The plaintiff still has alternate routes available other than compelling Radin to reveal his source. Thus, this Court still favors Radin's motion to quash or for a protective order over the plaintiff's motion to compel disclosure. Accordingly, the plaintiff's motion to vacate the two earlier orders is denied.

ORDER

It is hereby Ordered that plaintiff's motion to vacate orders and to compel discovery from deponent Charles A. Radin is DENIED.

_____
Thomas R. Morse, Jr.

Justice of the
Superior Court

Dated: November 23, 1987

UNITED STATES CONSTITUTION

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives -- Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, ~~excluding Indians not taxed.~~ But when the right to vote at any election for the choice of electors for President and Vice-President of the United States,

Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the

United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned -- Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MASS. GENERAL LAWS C. 214, § 1B

§1B. Right of Privacy; Remedy to Enforce.

A person shall have a right against unreasonable, substantial or serious

interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

MASS. GENERAL LAWS C. 214, § 3B

§3B. Actions to Recover Actual or Punitive Damages for, or for Injunctions or Mandamus against, Disclosure of Personal Data by Holder.

Any holder, as that term is defined in chapter sixty-six A, which violates any provision of said chapter sixty-six A, shall be liable to any individual who suffers any damage as a result of such violations, and the individual damaged may bring an action against such holder to recover any damages sustained. Notwithstanding any liability for actual

damages as may be shown, such holder shall be liable for exemplary damages of not less than one hundred dollars for each violation together with such costs and reasonable attorney's fees as may be incurred in said action.

Any holder which violates or proposes to violate any of the provisions of chapter sixty-six A shall be subject to an action for injunction, declaratory judgment, or mandamus issued by any court of competent jurisdiction. The court may make such order or judgment as may be necessary to prevent any holder from employing practices which violate chapter sixty-six A. Actions for injunction or mandamus under this section may be prosecuted by an individual or by the attorney general in the name of the

commonwealth upon his own complaint or upon the complaint of any individual.

An action to enforce any liability created under chapter sixty-six A, may be brought in any court of competent jurisdiction within three years from the date in which the liability arises; provided, however, that where a defendant had materially or willfully misused any personal data required to be disclosed to a data subject according to the provisions of chapter sixty-six A, and said personal data so misused is material to the establishment of the defendant's liability to the data subject, the action may be brought at any time within three years after such misuse is discovered.

MASS. GENERAL LAWS C. 231, §118

§118. Relief from Interlocutory Orders of Superior Court, etc.; Preliminary Injunctions.

A party aggrieved by an interlocutory order of a trial court justice in the superior court department, the housing court department, the land court department or the probate and family court department any file, within thirty days of the entry of such order, a petition in the appropriate appellate court seeking relief from such order. A single justice of the appellate court may, in his discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen.

A party aggrieved by an

interlocutory order of the trial court justice in the superior court department, the housing court department, the land court department or the probate and family court department, granting, continuing, modifying, refusing or dissolving a preliminary injunction, or refusing to dissolve a preliminary injunction, or a party aggrieved by an interlocutory order of a single justice of the appellate court granting a petition for refile from such an order, may appeal therefrom to the appeals court or, subject to the provisions of section ten of chapter two hundred and eleven A, to the supreme judicial court, which shall affirm, modify, vacate, set aside, reverse the order or remand the cause and direct the entry of such appropriate

order as may be just under the circumstances. An appeal under this paragraph shall be taken within thirty days of the date of the entry of the interlocutory order and in accordance with the Massachusetts rules of appellate procedure. Pursuant to action taken by the appellate court the cause shall be remanded to the trial court for further proceedings.

The filing of a petition hereunder shall not suspend the execution of the order which is the subject of the petition, except as otherwise ordered by a single justice of the appellate court.

MASS. GENERAL LAWS C. 66, §10

§10. Records Open for Public Inspection.

(a) Every person having custody of

any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search. The following fees shall apply to any public record in the custody of the state police, the capitol police, the Massachusetts Bay Transportation Authority police, the metropolitan district commission policy

of any municipal police department or fire department: for preparing and mailing a motor vehicle accident report, five dollars for not more than six pages and fifty cents for each additional page; for preparing and mailing a fire insurance report, five dollars for not more than six pages plus fifty cents for each additional page; for preparing and mailing crime, incident or miscellaneous reports, one dollar per page; for furnishing any public record, in hand, to a person requesting such records, fifty cents per page. A page shall be defined as one side of an eight and one-half by eleven inch sheet of paper.

(b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a

public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record comply with the person's request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to

insure compliance with the provisions of this section. The administrative remedy provided by this section shall in no way limit the availability of the administrative remedies provided by the commissioner of administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record with an administrative order under this section, the supreme judicial or superior court shall have jurisdiction to order compliance.

(c) In any court proceeding pursuant to paragraph (b) there shall be

a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(d) The clerk of every city or town shall post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office, a brief printed statement that any citizen may, at his discretion, obtain copies of certain public records from local officials for a fee as provided for in this chapter.

The commissioner of public safety and his agents, servants, and attorneys including the keeper of records of the firearms records bureau of said department, or any licensing authority, as defined by chapter one hundred and forty shall not disclose any records

divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition therefor, as defined in said chapter one hundred and forty and names and addresses of persons licensed to carry and/or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in chapter six and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

MASS. GENERAL LAWS. C. 4, §7
PARAGRAPH TWENTY-SIXTH (c)

"Public Records". - Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded

tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, unless such materials or data fall within the following exemptions in that they are:

(C) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.